In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 657

FEDERAL RADIO COMMISSION, PETITIONER

v.

NELSON BROTHERS BOND & MORTGAGE COMPANY
(Station WIBO)

No. 658

FEDERAL RADIO COMMISSION, PETITIONER

v.

NORTH SHORE CHURCH (STATION WPCC)

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE FEDERAL RADIO COMMISSION

Respondents, in their brief filed herein, do not question the constitutional power of Congress to regulate radio broadcasting, nor do they attack the validity of the Congressional policy, embodied in the Davis Amendment, to bring about a fair and

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equitable distribution of radio-broadcasting facilities among the States. But respondents apparently take the view (Brief, p. 63) that the process of equalization may not involve the removal of any "properly existing station".

We have endeavored to show that Congress, in enacting the Davis Amendment, intended that equalization should be carried out where necessary by the transfer to underquota areas of facilities already in use in overquota districts (Main Brief, pp. 20–29). Because of the limited number of broadcasting frequencies available, the policy of equalization can, as a practical matter, be carried out in no other way. The very fact that the available facilities are limited will tend to reduce to a minimum the number of stations which will voluntarily abandon their assignments or subject themselves to the revocation of their licenses for cause. Consequently, unless applicants in underquota States can obtain, upon a proper showing, facilities in use in overquota States by stations not otherwise subject to attack, underquota States must remain indefinitely underserved.

Heed must be given to the circumstances surrounding the passage of the Radio Act of 1927 and the Davis Amendment. Due to the almost instantaneous development of radio broadcasting, the novelty of the art, and the complexities of the problems created, some time was required before Congress could determine upon the principles which would guide the development of the art along lines most

consonant with the public interest. When it became apparent, furthermore, that the Radio Act of 1912 imposed practically no restriction on the number of stations which might broadcast, an excessive number of stations were established, concentrated largely in the metropolitan areas of the country. We do not believe that Congress was powerless to remedy this situation. We think that Congress had the power and exercised it in the enactment of the Radio Act of 1927 and the Davis Amendment of 1928.

The Radio Commission was charged by Congress with the duty of applying the policies of these statutes in particular cases by the exercise of its judgment upon the facts found by it. The findings of fact of the Commission which are supported by substantial evidence are by statute (Section 16 of the Radio Act, as amended) made conclusive, unless shown to be arbitrary or capricious. We believe it apparent from our main brief that the findings of the Commission in this case are amply supported by the evidence, and we submit that the substantial, detailed grounds upon which the Commission based its decision (Main Brief, pp. 6–7) are in accordance with the law, and fully sustain its action.

Certain contentions advanced by respondents, which were not considered in our main brief, are here noticed.

So far as the jurisdictional point is concerned what has been said in our reply brief in support of

the petitions for certiorari is supplemented by the citation of *Crowell* v. *Benson,* 285 U.S. 22, 54, and *Ma-King Products Company* v. *Blair,* 271 U.S. 479, 483.

Respondents contend (Brief, pp. 30–34) that the Commission departed from its own General Order 92 when, in considering the relative positions of Illinois and Indiana with reference to assignments of broadcasting facilities, it failed to regard the fact that Illinois, while it was over-quota in total assignments, was under-quota in "regional" facilities. Respondent's contention is, apparently, that the effect of General Order 92 was to provide that each State should have not merely its fair proportion of total facilities, but of each class of facilities as well. A cursory examination of that order (R. 1069–1072) will reveal, however, that its object was merely to establish a standard for computing the value of the various types of facilities in use in a State in order to enable the Commission to determine the relative standing of the State in total assignments.

The classification of broadcasting stations was undertaken by the Commission in its General Order 40,* promulgated after the enactment of the Davis Amendment. That order apportioned the available frequencies among the different classes of stations, designating particular groups of fre-

* This order is set forth in the Commission's Annual Report for the year ending June 30, 1928, pp. 48–49. The order is analyzed and explained at pp. 214–220.

quencies for use by stations belonging to each class. By General Order 40, as amended, a number of frequencies were set aside for use by stations operating on clear channels, with power of 5 kw or more, permitting the reception of their programs at great distances. Other frequencies were set apart for simultaneous use by two or more stations operating in different zones, with power of 1,000 w or less, each serving a regional area in its State. A third group of frequencies was designated for simultaneous use by two or more low-powered stations within each zone, each serving a local or city area. These three classes of stations became popularly known as clear, regional, and local channel stations (R. 752).

In November 1928 a comprehensive reallocation of assignments of frequencies, power, and hours of operation to stations then operating was made in order to bring all stations within the classifications provided for in General Order 40, and in order also, so far as possible without removing any existing station, to distribute each of the various classes of facilities fairly among the zones and States (Annual Report, 1928, pp. 17–18, 215–218). There was no determination by the Commission, however, that the Davis Amendment required that each class of facilities should be separately prorated among the zones and States.

At that time, in the absence of any method of comparing the values of the different classes of facilities, the Commission was unable to determine

whether a State was over or under quota in total facilities (R. 388). It was on this account that General Order 92 was adopted in June 1930. This order, by assigning a unit value to each type of facility, enabled the Commission to compute the relative value of the total facilities licensed to each State. The need supplied by General Order 92 is explained by the Commission as follows (R. 753):

> Under the 1928 system, if a State was "under-quota" on one class of service and "over-quota" on another class, it was not practicable to determine the total value of the three classes of assignments so that one could be balanced against another to determine if a State was actually "under- or over-quota" on total radio facilities.
>
> Therefore, the development of a "unit system" was undertaken to evaluate stations, based on type of channel, power, hours of operation, and all other considerations required by law.

The Commission's engineer testified that under the regulations and engineering practices of the Commission, all calculations in regard to quota are based on total facilities, irrespective of the ratio of the three classes of stations (R. 392–393). The examiner ruled that the quota status of Illinois with respect to regional facilities was not material (R. 392–393).

Even if, as respondents appear to claim, General Order 92 did embody a plan providing for the allocation to each State of a specified quantity of each

class of facilities, such a plan would not be binding either on the Commission itself or on applicants for facilities. The latter would certainly be entitled to be heard with respect to the propriety of the application of the plan as it affected them. The plan would amount at most to a general guide for the Commission in applying the statutory standard: the Commission would be free to follow it or not in individual cases, as the facts and the law required.

We fail to see anything in the Davis Amendment which suggests, as respondents appear to contend (Brief, p. 34), that a State is entitled to any particular quota of each class of stations. The standard of the statute is a broad one—fair and equitable treatment of each of the States—and it is for the Commission to determine whether the circumstances of a particular State warrant the assignment to it of more of one class of facilities than another. As between Illinois and Indiana, for example, there would seem to be ample justification for assigning a relatively greater proportion of high power clear channel stations to the former and of low power regional stations to the latter.

Another contention of respondents (Brief, p. 30), one which was adopted by the court below (R. 1141), is that each of the three stations here involved received its present assignment in the general reallocation made in 1928 and that no showing has been made of a change in conditions since that

time. But in so far as the 1928 reallocation failed to establish the equitable distribution of facilities required by the law, it could have no finality. It is apparent, also, from the character of that reallocation (*supra*, p. 5) that it was not intended to determine finally the respective rights of individual stations.

Furthermore, in carrying out the general reallocation in 1928 the Commission determined that no existing stations should at that time be abolished. It was contemplated that improvement would be made in the future "wherever interference is found to exist in actual operation, through the reduction of power or the elimination of particular stations." (Commission's Annual Report, 1928, p. 215.) The present record shows that Station WJKS soon complained of interference experience on the frequency then assigned to it, and was authorized to increase its power output (R. 63). When this failed to eliminate the interference, and after Station WJKS had filed numerous further complaints with the Commission, the proceedings here involved were instituted (R. 63, 72, 83, 84).

There is no substance, either, in respondent's contentions (Brief, pp. 22–23, 66–67) based upon Section 14 of the Radio Act, providing for the revocation of broadcasting licenses for cause. No question of revocation of licenses is here involved, since respondents were operating under renewal licenses made expressly subject to such action as

the Commission should take after hearing on the application by Station WJKS (R. 39, 41, 42–43). *Technical Radio Laboratories* v. *Federal Radio Commission,* 36 F. (2d) 111, cited by respondents (Brief, p. 67), is not pertinent. That case decided merely that an appeal from the refusal of the Commission to renew a license, was not rendered moot by the fact that the renewal license, if granted, would since have expired. The basis of this ruling was that the appeal involved not merely the applicant's right to obtain the particular renewal license but also to its right to apply for further renewals thereafter. *Westinghouse Electric & Manufacturing Company* v. *Federal Radio Commission,* 47 F. (2d) 415, also cited by respondents (Brief, p. 67), decided that the Commission was not authorized to insert in a renewal license a proviso that no further renewal would be granted if application was made for the licensed facilities from another zone, unless provision was made for a hearing. In this case a hearing has been had.

Respondents set forth in their brief (pp. 45–47) the conclusions and recommendations of the Commission's examiner. Having been rejected by the Commission, we believe that they are entitled to no weight. In any event they are, we submit, either based on an erroneous conception of the law or conflict with findings of the Commission, supported by substantial evidence. The examiner's conclusion (No. 2) that the applicant had failed

to prove that less objectionable interference would result from the operation of Station WJKS on the 560 kc frequency was inconsistent with the Commission's finding that Station WIBO was clearly heard in Gary without interference (R. 1130). There was substantial testimony that the applicant's reception would be clear on that frequency (Main Brief, pp. 38–39).

His conclusion (No. 4) that the service of Station WJKS would be improved by the installation of the most modern radio equipment and operation in the most efficient manner on its present frequency was inconsistent with the findings of the Commission, supported by substantial evidence (Main Brief, pp. 37–38; R. 1127–1128), that the equipment of Station WJKS was in good mechanical and electrical condition and that Station WJKS delivered a signal of sufficient strength to give good reception in its normal service area if not interfered with. The conclusion (No. 5) that it was possible that more objectionable interference might result to other stations from the operation of the applicant on the 560 kc frequency was inconsistent with the Commission's findings (R. 1128, 1130), amply supported by evidence (Main Brief, p. 39), that such interference would not be expected.

The examiner also stated (Nos. 7, 8) that Indiana and the Calumet region received programs broadcast by the respondent stations, but he failed to point out that the programs of none of the Chicago

stations were designed to meet the needs of the Calumet area, served by Station WJKS (Main Brief, pp. 7–8, 22).

Respectfully submitted.

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